UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOLIVAR MEDINA, Petitioner,	:	12 Civ. 238 (JPO)
-against-	:	86 Crim. 238 (WK)
UNITED STATES OF AMERICA, Respondent.	:	MEMORANDUM AND ORDER

J. PAUL OETKEN, District Judge:

On or about May 12, 1986, Bolivar Medina pleaded guilty to possession and distribution of cocaine near a school. (Pet., Dkt. No. 1 at 1.[1]) He now appears *pro se* and petitions for a writ of error *coram nobis*, arguing that his counsel's failure to warn him of the immigration consequences of a guilty plea deprived him of effective assistance of counsel. (*Id.* at 2; Pet.'s Aff., Dkt. No. 1 at 7.) His argument relies on retroactive application of the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). (Dkt. No. 1 at 2.) Whether or not *Padilla* has any retroactive effect—an issue that need not be decided here—the rule announced in that case does not apply to a conviction as old as Medina's 1986 conviction. Accordingly, Medina's petition is denied. Medina also filed an application, dated February 7, 2012, for the Court to request *pro bono* counsel. (Dkt. No. 8.) That application is also denied.

I. Background

Before the Court are Medina's petition and his supporting affirmation. (Dkt. No. 1 at 1-8.) Medina's affirmation alleges that his "[c]ounsel failed to inform [him] of the immigration consequences of his guilty plea . . ." and that he "only recently learned that his guilty plea would

[1] Several documents have been filed together at docket entry number 1. Page references to all docket entries here refer to the page numbers added to the tops of the pages when the documents were docketed.

subject him to deportation." (*Id.*at 7-8.) Medina argues that his conviction should be vacated by application of the rule announced in *Padilla*. He also briefly argues that, because he was unaware of the impact a conviction would have on his immigration status, his guilty plea was not knowing and intelligent and was therefore void under *McCarthy v. United States*, 394 U.S. 459 (1969). (Dkt. No. 1 at 3.)

Respondent United States of America was ordered to answer the petition by March 25, 2012. (Dkt. No. 5.) However, Medina informed the Court in a letter that "[he is] in [his] final removal stage in court on February 22, 2012." (Dkt. No. 1 at 16.) In order to decide this matter before Medina is removed or ordered removed from the United States, the Court now addresses the merits of Medina's petition without the benefit of an answer from Respondent.

II. Applicable Standards

"[A] court is ordinarily obligated to afford a special solicitude to pro se litigants," *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010) (internal citations omitted). Because Medina appears *pro se*, his pleadings "must be read liberally and should be interpreted to raise the strongest arguments that they suggest." *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996) (internal quotation marks and citation omitted).

Medina's petition seeks a writ of error *coram nobis*, a form of relief which was available at common law before the Republic's founding. The writ was implicitly authorized for exercise in federal courts by the All Writs Act, 28 U.S.C. § 1651(a). *United States v. Morgan*, 346 U.S. 502, 506 (1954). Through *coram nobis*, a district court has "power to vacate its judgment of conviction and sentence after the expiration of the full term of service." *Id.* at 503. "*Coram nobis* is essentially a remedy of last resort for petitioners who are no longer in custody pursuant to a criminal conviction and therefore cannot pursue direct review or collateral relief by means of a writ of *habeas corpus*." *Fleming v. United States*, 146 F.3d 88, 89-90 (2d Cir. 1998).

"Because of the similarities between *coram nobis* proceedings and [28 U.S.C.] § 2255 proceedings, the § 2255 procedure often is applied by analogy in *coram nobis* cases." *Id.* at 90 n.2.

To obtain a writ of *coram nobis*, a petitioner must show that "1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting the writ." *Id.* at 90. Moreover, *coram nobis* relief is limited to cases where "errors of the most fundamental character have rendered the proceeding itself irregular and invalid." *Foont v. United States*, 93 F.3d 76, 78 (2d Cir. 1996) (internal quotation marks and citations omitted). "In reviewing a petition for the writ, a federal court must presume the proceedings were correct. The burden of showing otherwise rests on the petitioner." *Fleming*, 146 F.3d at 90; *Foont*, 93 F.3d at 78-79.

III. Timeliness

"[B]ecause a petition for writ of error *coram nobis* is a collateral attack on a criminal conviction, the time for filing a petition is not subject to a specific statute of limitations." *Foont*, 93 F.3d at 79 (internal quotation marks and citation omitted); *see also United States v. Morgan*, 346 U.S. 502, 507 (1954) (explaining that *coram nobis* petitions were allowed at common law "without limitation of time"). Still, "*coram nobis* relief may be barred by the passage of time. A district court considering the timeliness of a petition for a writ of error *coram nobis* must decide the issue in light of the circumstances of the individual case." *Foont*, 93 F.3d at 79. "In lieu of a specific statute of limitations, courts have required *coram nobis* petitioners to provide valid or sound reasons explaining why they did not attack their sentences or convictions earlier." *United States v. Kwan*, 2005 U.S. App. LEXIS 14806 (9th Cir. July 21, 2005).

Medina's conviction dates back to 1986. (Dkt. No. 1 at 1.) That he has waited over twenty-five years to seek *coram nobis* relief raises questions as to whether that "relief [is] barred by the passage of time." *Foont*, 93 F.3d at 79. Medina has sworn, however, that he "only recently learned that his guilty plea would subject him to deportation." (Dkt. No. 1 at 8.) Medina does not specify how recently he learned of the immigration consequences of his conviction. However, especially in light of the special solicitude to be shown to *pro se* litigants and the lenient timeliness standard for *coram nobis* relief, Medina's statement that he "recently" became aware of the alleged constitutional deficiency in his conviction is a sufficient explanation, at least at the present stage of proceedings, of why he did not attack his conviction earlier. His petition is therefore deemed timely.

IV. Discussion

As Medina is no longer incarcerated but apparently faces removal proceedings, his petition was properly filed as one for *coram nobis* relief. *Cf. Ogunwomoju v. United States*, 512 F.3d 69 (2d Cir. 2008) (immigration detention not custody for *habeas corpus* challenge to conviction under 28 U.S.C. § 2254).

Medina argues that his conviction was constitutionally deficient because he was not afforded effective assistance of counsel. The Sixth Amendment of the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In *Strickland v. Washington*, the Supreme Court held that a criminal conviction will be reversed for ineffective assistance of counsel only if the defendant makes both of the following showings. First, the defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Second, the defendant must

demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A. *Padilla v. Kentucky*

In *Padilla v. Kentucky*, the Court held that counsel's failure to "inform her client whether his plea carries a risk of deportation" constituted such a serious error that the counsel in that case was constitutionally ineffective under *Strickland*. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1487 (2010). In reaching its conclusion, the *Padilla* Court explained that the Nation's immigration laws have become progressively more stringent. *Id.* at 1480. The Court pointed to the Immigration and Nationality Act of 1917 that authorized deportation as a consequence of certain "crime[s] of moral turpitude." *Id.* (citing 39 Stat. 889). That law was followed by the 1922 Narcotic Drug Act, which explicitly made narcotics offenses "a special category of crimes triggering deportation." *Padilla*, 130 S. Ct. at 1480 (citing Act of May 26, 1922, ch. 202, 42 Stat. 596). Then in the 1952 Immigration and Nationality Act (INA), Congress eliminated the power of federal courts to recommend (and effectively decide) the immigration effects of a narcotics conviction. *Padilla*, 130 S. Ct. at 1480 n.5 (citing 66 Stat. 201, 204, 206; *United States v. O'Rourke*, 213 F.2d 759, 762 (8th Cir. 1954)).

Finally, in 1996, Congress did away with the Attorney General's power to grant discretionary relief from deportation. *Padilla*, 130 S. Ct. at 1480 (citing 110 Stat. 3009-596). That power had been used to prevent the deportation of over 10,000 persons in the five years leading up to 1996. *Padilla*, 130 S. Ct. at 1480 (citing *INS v. St. Cyr*, 533 U.S. 289, 296 (2001)). "If a noncitizen committed a removal offense after the 1996 effective date of these [1996] amendments, [the noncitizen's] removal is practically inevitable . . . ." *Padilla*, 130 S. Ct. at 1480. "These changes to our immigration law have dramatically raised the stakes of a

noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Id.*

In reaching its holding, the Court also relied on "[t]he weight of prevailing professional norms [that] supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 1482. On this point, the Court cited seven different authorities on standards for representation of criminal defendants, including guidelines from the American Bar Association and the National Legal Aid and Defender Association. *Id.* However, the earliest of these authorities dates from 1993. *Id.*

The merits of Medina's ineffective-assistance-of-counsel argument depend entirely on the retroactive applicability of *Padilla*'s holding. As explained below, though the retroactivity of that holding is an open question in this Circuit, *Padilla* does not apply to Medina's 1986 conviction.

B. *Padilla*'s Retroactivity

The Second Circuit recently noted "that it is an open question in this circuit whether the rule articulated in *Padilla* applies retroactively and that our sister circuits have reached divergent conclusions on this issue." *Hill v. Holder*, 2012 U.S. App. LEXIS 336, *4 n.2 (2d Cir. Jan. 6, 2012). The Seventh and Tenth Circuits have held that Padilla does not have retroactive effect. *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011); *United States v. Chang Hong*, 2011 U.S. App. LEXIS 18034, at *22-23 (10th Cir. 2011). Only the Third Circuit has held that *Padilla* does have retroactive effect. *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011). Even under the Third Circuit's holding, however, *Padilla* would not apply to the instant petition.

1. The *Teague* Test for Retroactivity

In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court set forth the framework for determining whether a constitutional rule of criminal procedure applies retroactively. The

Teague Court held that such a rule applies to all cases on direct and collateral review if it is not a new rule, but rather an old rule applied to new facts. *Id.* A new rule will apply only to cases still under direct review, unless one of two exceptions applies. *Id.* A new rule applies retroactively on collateral review only if it is substantive or if it is a "'watershed rule[] . . . [that] 'properly alter[s] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.'" *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971)).

2. Seventh and Tenth Circuits: *Padilla* Has No Retroactive Effect

In determining whether Padilla has retroactive effect, the Seventh and Tenth Circuits largely followed the same reasoning. They began with *Teague*'s holding that a rule is "new when it was not 'dictated by precedent existing at the time the defendant's conviction became final.'" *Chaidez*, 655 F.3d at 688; *cf. Chang Hong*, 2011 U.S. App. LEXIS 18034, at *16. "The pertinent inquiry [was] whether *Padilla*'s outcome was 'susceptible to debate among reasonable minds," such as lower-court judges and Supreme Court justices not in the majority. *Chaidez*, 655 F.3d at 688-89; *cf. Chang Hong*, 2011 U.S. App. LEXIS 18034, at *19-22.

"Prior to Padilla, the lower federal courts, including at least nine Courts of Appeals, had uniformly held that the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea." *Chaidez*, 655 F.3d at 690 (citing *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring in judgment)).

In *Padilla* itself, Justice Scalia authored a dissenting opinion, in which Justice Thomas joined; Justice Alito issued an opinion concurring in the judgment, joined by Chief Justice Roberts, characterizing the *Padilla* rule as a "dramatic departure from precedent" and "a major upheaval in Sixth Amendment law." *Chaidez*, 655 F.3d at 689 (quoting *Padilla*, 130 S. Ct. at 1491-92). "That the members of the *Padilla* Court expressed such an 'array of views' indicates

that *Padilla* was not dictated by precedent." *Chaidez*, 655 F.3d at 689 (quoting *O'Dell v. Netherland*, 521 U.S. 151, 159 (1997). The Seventh Circuit also saw suggestions in the majority *Padilla* decision "that the rule it announced was not *dictated* by precedent." *Chaidez*, 655 F.3d at 689.

Because of the contrary conclusions reached by some Supreme Court justices and lower-court judges, the Seventh and Tenth Circuits held that *Padilla* announced a new rule. *Chaidez*, 655 F.3d at 694; *Chang Hong*, 2011 U.S. App. LEXIS 18034, at *22-23 ("[W]e find *Padilla* announced a new rule of constitutional law . . . . [We] believe *Padilla* marked a dramatic shift when it applied *Strickland* to collateral civil consequences of a conviction—a line courts had never crossed before.").

The Tenth Circuit considered whether *Padilla* fit either of the two exceptions under which a new rule may apply retroactively: when a new rule is substantive and when a new rule is a "watershed" rule.[2] *Id.* at *29. On the first exception, the court held that "[t]he rule in *Padilla* is procedural, not substantive. It regulates the manner in which a defendant arrives at a decision to plead guilty." *Id.* And to be a "watershed" rule, the Tenth Circuit explained:

> a new rule (1) must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and (2) must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. . . . Elevating the standard even more, a showing that a new procedural rule is based on a "bedrock" right is insufficient because a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding.

Id. at *29-30 (quoting *Whorton v. Bockting*, 549 U.S. 406, 417-18 (2007)) (internal quotation marks and citations omitted). Under this standard, the court concluded that "*Padilla* did not

[2] The Seventh Circuit did not consider those exceptions because both parties in its case agreed that neither exception applied. *Chaidez*, 655 F.3d at 589.

announce a watershed rule of criminal procedure." *Chang Hong*, 2011 U.S. App. LEXIS 18034, at *30.

3. Third Circuit: *Padilla* Applies Retroactively

In a case concerning a 2004 guilty plea by a *coram nobis* petitioner, Gerald Orocio, the Third Circuit reached the conclusion that "application of *Strickland* to the *Padilla* scenario is not so removed from the broader outlines of precedent as to constitute a 'new rule . . . .'" *Orocio*, 645 F.3d at 638. The court supported its conclusion by pointing to developments in the years immediately before *Padilla* but did not suggest that the *Padilla* rule would have applied earlier. The court explained its decision in part with reference to evolving standards for legal representation:

> *Strickland* and *Hill* required counsel to advise criminal defendants at the plea stage in accordance with precedent and prevailing professional norms to ensure that the defendant makes an informed, knowing, and voluntary decision whether to plead guilty. . . . When Mr. Orocio pled guilty, it was "hardly novel" for counsel to provide advice to defendants at the plea stage concerning the immigration consequences of a guilty plea, undoubtedly an "important decision" for a defendant. *See Padilla*, 130 S. Ct. at 1485 ("For at least the past 15 years [*i.e.*, since 1995], professional norms have generally imposed an obligation on counsel to provide advice on the [removal] consequences of a client's plea.").

Id. at 639.

The Third Circuit offered a similarly temporally based explanation for its discounting of contrary lower-court decisions prior to *Padilla*:

> Lower court decisions not in harmony with *Padilla* were, with few exceptions, decided before 1995 and pre-date the professional norms that, as the *Padilla* court recognized, had long demanded that competent counsel provide advice on the removal consequences of a client's plea. *Padilla*, 130 S. Ct. at 1485. While at the time of those early decisions courts had not yet recognized that a lawyer fails in his professional duty when he does not advise an alien client of the potentially grave immigration consequences of a guilty plea, by 2004, when Mr. Orocio pled guilty, the norms of effective assistance—norms keyed to contemporaneous professional standards—had become far more demanding.

*Id.*at 640. The Third Circuit also viewed the *Padilla* Court's discussion of a "floodgate" concern as indicating anticipation that *Padilla* would apply retroactively. *Id.* at 641 (citing *Padilla,* 130 S. Ct. at 1484-85).

C. Application to Medina's Petition

Unlike the 2004 conviction in the Third Circuit's *Orocio* case, Medina's conviction occurred in 1986. To date, the Second Circuit has been silent on *Padilla*'s retroactivity. But even assuming that *Padilla* has retroactive effect, that effect does not extend to Medina's petition. The Third Circuit justified its holding of retroactivity by reference to the raised lawyering standards that came into force around 1995; and it discounted unanimous lower-court decisions contrary to *Padilla* on the ground that they mostly came before 1995. Medina's conviction occurred before "prevailing professional norms" had come to recognize advice on immigration consequences as necessary to representation of a criminal defendant considering a guilty plea. Indeed, Medina's conviction predated the 1996 law that made removal of a noncitizen convicted of a drug crime "practically inevitable" in the eyes of the *Padilla* Court.

The rule announced in *Padilla* cannot reach back further than the laws and conditions that, *arguendo*, dictated it. *Cf. Sawyer v. Smith*, 497 U.S. 227, 234 (1990) ("The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered. This is but a recognition that the purpose of federal *habeas corpus* is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.").

For the same reason, Medina has not shown that his guilty plea was not knowing and intelligent. The law before *Padilla* did not hold knowledge of immigration consequences to be a

prerequisite to a guilty plea. *See Brea v. New York City Prob. Dep't*, 2004 U.S. Dist. LEXIS 3142 (S.D.N.Y. Mar. 3, 2004) ("Because deportation is a collateral consequence of conviction, there is no requirement that a defendant be made aware of the possibility of deportation prior to pleading guilty.") (citing *United States v. Santelises*, 476 F.2d 787, 790 (2d Cir. 1973); *accord United States v. Salerno*, 66 F.3d 544, 550-51 (2d Cir. 1995), *cert. denied*, 516 U.S. 1063 (1996)). Nor did *Padilla* expressly change that aspect of the law.

Because it is clear that Medina is not entitled to relief, his petition for a writ of error *coram nobis* will be and is hereby denied. *See Fleming v. United States*, 146 F.3d 88, 90 n.2 (2d Cir. 1998) ("Because of the similarities between *coram nobis* proceedings and [28 U.S.C.] § 2255 proceedings, the § 2255 procedure often is applied by analogy in *coram nobis* cases."); *Davis v. United States*, 2003 U.S. Dist. LEXIS 6531, *2-3 (E.D.N.Y. Mar. 13, 2003) ("A district court may dismiss a Section 2255 motion, *sua sponte*, 'if it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court . . . .") (citing R. Governing Sec. 2254 Cases 4(b); 28 U.S.C. § 2255).

V. Application for Court to Request Counsel

Medina also filed an application for the Court to request counsel to represent him. (Dkt. No. 8.) In determining whether to grant an application for counsel, the Court must consider

> the merits of a plaintiff's case, the plaintiff's ability to pay for private counsel, his efforts to obtain a lawyer, the availability of counsel, and the plaintiff's ability to gather the facts and deal with the issues if unassisted by counsel.

Cooper v. A. Sargenti Co., Inc., 877 F.2d 170, 172 (2d Cir. 1989) (per curiam). As a threshold matter, in order to qualify for appointment of counsel, a plaintiff must demonstrate that his claim has substance or a likelihood of success. *See Hodge v. Police Officers*, 802 F.2d 58, 60-61 (2d Cir. 1986). In addition, in reviewing a request for appointment of counsel, the Court must be

cognizant of the fact that volunteer attorney time is a precious commodity, and thus, should not grant appointment of counsel indiscriminately. *Cooper*, 877 F.2d at 172.

As discussed above, Medina's petition cannot succeed. Accordingly, his application for the Court to request counsel must be denied.

VI. Conclusion

For the reasons set forth above, Medina's petition for a writ of error *coram nobis* is DENIED.

Medina's application for the Court to request counsel is also DENIED.

The Clerk of Court is respectfully directed to close the motion at docket entry number 8 and to terminate this case.

SO ORDERED.

Dated: New York, New York
February 21, 2012

J. PAUL OETKEN
United States District Judge